No. 92-1787

Supreme Court, U.S.
MAY 10 1993

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

ROBERT B. NEWMAN,

Petitioner,

against

HONORABLE GEORGE VOINOVICH,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does it violate the First and Fourteenth Amendments of the United States Constitution for the Governor of Ohio, in filling vacancies in judicial office, to systematically limit his consideration of possible appointees to members of his own political party, purposely excluding at the threshold all applicants not of his party?

2. Does the test applied by the Court of Appeals for political patronage hiring, i.e., whether the appointee is a "policy-maker", conflict with the "political party affiliation" test enunciated by this Court in *Branti* v. *Finkel*, 445 U.S. 507 (1980) and *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990)?

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Sixth Circuit are:

1. Robert B. Newman, Plaintiff-Appellant in the Court below.

2. George Voinovich, the Governor of the State of Ohio, Defendant-Appellee in the Court below.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions; Statute	2
Statement of the Case	2
Reasons for Granting the Writ	6
I. The Court below has decided an important question of federal law which has not been, but should be, settled by this Court	6
A. The Question is of Fundamental Importance to American Law	6
B. Confusion Abounds in Lower Courts	8
II. The Court below has decided a federal question in a way that conflicts with applicable decisions of this Court	10
A. The Sixth Circuit Applied a Test Revoked by this Court	10
B. The Sixth Circuit Applied the Wrong Test in the Wrong Way	14
Conclusion	16

Page

APPENDIX

Opinion of the Court of Appeals for the Sixth Circuit ... 1a

Opinion of the United States District Court for the Southern District of Ohio ... 15a

First Amendment ... 35a

Fourteenth Amendment, Section 1 ... 35a

Ohio Const. Art. IV, § 13 ... 35a

42 U.S.C. § 1983 ... 36a

TABLE OF AUTHORITIES

Page

Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813 (1986) 12

Branti v. *Finkel*, 445 U.S. 507 (1980) 1, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15

Elrod v. *Burns*, 427 U.S. 347 (1976) 4, 6, 8, 9, 10, 11, 12

Faughender v. *City of North Olmsted, Ohio*, 927 F.2d 909 (6th Cir. 1991) 5, 8, 12

Garretto v. *Cooperman*, 510 F. Supp. 816 (S.D.N.Y. 1981), aff'd mem., 794 F.2d 671 (2d Cir. 1984) 8, 12

Gregory v. *Ashcroft*, 111 S. Ct. 2395 (1991) 13

Kurowski v. *Krajewski*, 848 F.2d 767 (7th Cir.), cert. denied, 488 U.S. 926 (1988) 8, 9, 13

Pounds v. *Griepenstroh*, 970 F.2d 338 (7th Cir. 1992) ..9, 12

Rutan v. *Republican Party of Illinois*, 497 U.S. 62 (1990) 1, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14

State ex rel. Weinberger v. *Miller*, 87 Ohio St. 12, 99 N.E. 1078 (1912) 11

Ward v. *Village of Monroeville, Ohio*, 409 U.S. 57 (1972) 12

Page

OTHER AUTHORITIES

First Amendment 6, 14, 15

28 U.S.C. § 1254(1) 1

29 U.S.C. § 630(f) 13

42 U.S.C. § 1973 4

42 U.S.C. § 1983 3

28 U.S.C. § 1331 3

Ohio Const., Art. IV, § 13 ..... 2, 7

Alarcon, Political Appointments and Judicial Independence: An Unreasonable Expectation, 16 Loy. (L.A.) L. Rev. 9 (1983) 12

Aumann, The Selection, Tenure, Retirement and Compensation of Judges in Ohio, 5 U. Cin. L. Rev. 408 (1931) 11

Baum, The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas, 66 Judicature 420 (1983) 7

Casenote, 23 Ariz. St. L. J. 1127 (1991) 9

Casenote, 11 N. Ill. U. L. Rev. 375 (1991) 9

Council of State Governments, The Book of the States (1992-93) 7

Martin, A Decade of Branti Decisons: A Government Official's Guide to Patronage, 39 Am. U. L. Rev. 11 (1989) 8-9

The Supreme Court, 1989 Term, 104 Harv. L. Rev. 129 (1990) 9

Page

Thomas, Transition From Policymaker to Judge — A Matter of Deference, 26 Creighton L. Rev. 241 (1993) 13

Winters, Selection of Judges — An Historical Introduction, 44 Tex. L. Rev. 1081 (1966) 7

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is printed in Petitioner's Appendix at pages 1a-14a. It is reported at 986 F.2d 159 (6th Cir. 1993). The opinion of the United States District Court for the Southern District of Ohio is printed in Petitioner's Appendix at pages 15a-34a. It is reported at 789 F. Supp. 1410 (S.D. Ohio 1992).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on February 22, 1993. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS; STATUTE

U.S. Const., Amend. I
U.S. Const., Amend. XIV, Sec. 1
Ohio Const., Art. IV, Sec. 13
42 U.S.C. § 1983
See text in appendix

STATEMENT OF THE CASE

In Ohio, judges are elected on a nonpartisan ballot for six year terms and are constrained by the Code of Judicial Ethics to be independent, impartial and unswayed by partisan interests. Vacancies caused by death or resignation are filled by gubernatorial appointment.[1]

Petitioner Robert B. Newman, a Cincinnati trial lawyer of twenty-five years' experience and an active member of the Democratic Party, applied, on February 7, 1992, for consideration by the Respondent Governor of Ohio to fill a vacancy on the Common Pleas Court of Hamilton County, Ohio resulting from the resignation of Judge Norman Murdock. Although Petitioner received written assurance that he would be considered, no such consideration was given.

The vacancy was filled by appointment of a Republican lawyer whose name was submitted by the Republican County Chairman pursuant to a systematic and written plan whereby the governor considers only applicants who are members of his own political party and who have been recommended by the Republican County Chairman. Thus, shortly after his election, the Defendant Governor sent a letter to the Republican County Chairman in each of Ohio's eighty-eight

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[1] The appointee, to retain the office, must run at the next general election occurring more than 40 days after the vacancy occurred, except that if the unexpired term ends within one year after the election, the appointment is for the unexpired term. Ohio Constitution, Article IV, § 13.

counties inviting them to submit the names of applicants to fill judicial vacancies and outlining the procedures to be followed. No such letter was sent to persons other than to the Republican County Chairman.

The Governor gives virtually no consideration to applicants who are not affiliated with the Governor's Party.[2] In many, if not most, instances only one name is submitted by the County Chairman for a particular vacancy. In all events, applicants' resumes are reviewed by the Governor's appointments assistant, Andrew Futey, a 25 year-old law student. In virtually all instances the Governor accepts Mr. Futey's recommendation, which is based on the County Chairman's recommendation.[3]

Although the Governor reviews the material submitted by Mr. Futey, there is no evidence that the Governor, with the exception of appointments in his home county of Cuyahoga, exercises any personal discretion regarding the qualifications, social ideas or judicial philosophy of the Republican applicants.

In Ohio, interim appointees may remain in office for as long as a year before running for election (See footnote 1). Once appointed, the incumbent judge has an overwhelming advantage in the ensuing election, the experience being that 84% of such judges are elected for a full six-year term.[4]

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[2] As of the preliminary injunction hearing date forty-three of the Governor's forty-five appointments had been Republicans. Two Democrats had been named, one because no Republican applicant could be found in the county; the other was appointed to serve a three-week hiatus prior to commencing a full term to which he had been elected.

[3] It should be noted that similar practices regarding judicial appointments of members of the Governor's own political party have been the norm in Ohio for many years during Democratic (with the exception of Governor John J. Gilligan) as well as Republican administrations.

[4] Both the District Court and Court of Appeals recognized that the facts are essentially undisputed and, in any event, assumed their validity in

Petitioner brought an action in the United States District Court for the Southern District of Ohio, under 42 U.S.C. § 1983, and 28 U.S.C. § 1331 asking for a preliminary injunction requiring that his application be considered and that the Respondent Governor be permanently enjoined from rejecting from consideration all applicants not of the Governor's political party, and for other relief. Petitioner's claims were based on the First and Fourteenth Amendments to the United States Constitution, Article I, § 11 of the Ohio Constitution and the Voting Rights Act (42 U.S.C. § 1973 et seq.).

The District Court denied Plaintiff's Motion for Preliminary Injunction and dismissed the Complaint for failure to state a claim. In doing so, the Court drew its own analysis of *Elrod* v. *Burns*, 427 U.S. 347 (1976), *Branti* v. *Finkel*, 445 U.S. 507 (1980), and *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990), recognizing that in *Branti* this Court had "reformulated the 'policymaking' equation of *Elrod* to instead provide that patronage activity is permissible if 'the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.' " The District Court also said, "This approach has since been recognized and utilized in the Sixth Circuit and other Circuits." The District Court then applied the "political affiliation" test and held that a Governor may properly appoint judges with the *purpose* and *expectation* that the judge will decide in a manner consonant with the Governor's political views.

Petitioner filed a timely appeal to the United States Circuit Court for the Sixth Circuit. Petitioner did not appeal the District Court's dismissal of issues arising under the Voting Rights Act.

The Sixth Circuit, on February 22, 1993, affirmed the

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deciding against Petitioner as a matter of law. The facts summarized in this Petition are discussed in the opinions below and set out in the record of the hearing on Plaintiff's Motion for a Preliminary Injunction.

District Court's dismissal of Petitioner's cause of action and denial of injunctive relief. The Circuit Court first held that there is "no meaningful distinction between 'hiring decisions' for a public position as discussed in *Rutan* and making an 'appointment' to a public position as presented here." But the Court did not follow the "political affiliation test," which the District Court had followed by relying on *Branti* (and on the Sixth Circuit's own case law in *Faughender* v. *City of North Olmsted, Ohio*, 927 F.2d 909 (6th Cir. 1991)). Instead the Sixth Circuit reverted to the "policymaking" test used in *Elrod* but which has been replaced by the "political affiliation test" enunciated in *Branti*. Thus, Judge Keith stated,

> "With respect to gubernatorial appointments to the state judiciary, we hold that judges are *policymakers* within the meaning of *Elrod* and *Branti*. Therefore, Governor Voinovich is free to make judicial appointments *based on political considerations*." (emphasis ours).

In his concurring opinion, Judge Jones asserted that ". . . while a judge may be a 'policymaker' in a broad sense, a judge is not a policymaker for the appointing Governor."

Judge Jones also stated:

> "Similarly, it cannot be seriously contended that being a member of a certain party, in this case the Republican Party, should be a requirement for the effective performance of being a judge."

Nonetheless, Judge Jones joined in the Court's decision.

REASONS FOR GRANTING THE WRIT

I.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Sixth Circuit held that the Governor of Ohio may fill vacancies in state judicial offices on a political patronage basis, systematically excluding from consideration any applicant not a member of the Governor's political party. This holding presents an issue not settled by this Court's decisions in *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980), and *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62 (1990), namely, the applicability of these decisions to Executive appointments of state judges.

The holding of the Court below seriously erodes the First Amendment protections enunciated by this Court in *Elrod*, *Branti* and *Rutan*. Those cases reiterate earlier decisions that applicants for government positions cannot automatically be excluded from consideration based on their political beliefs, which, of all beliefs, are central to First Amendment protection. Yet that is precisely what occurred in this case. That basic proposition is thwarted by the appointment practices of the Respondent Governor.

This is *not* a case of the Governor using political affiliation as one of various considerations. It is a case of absolute exclusion of any applicant not of his party, without any consideration whatsoever.

A. The Question is of Fundamental Importance to American Law.

As the record below demonstrates, Ohio Governors (with one exception) have filled judicial vacancies on a political patronage basis and there is no reason to believe they will do otherwise in the future. Indeed, as of the commencement of

this action, the Respondent Governor had in two years of a four year term made 43 partisan judicial appointments.[5] Moreover, the issue is of equal importance in other states in which judicial vacancies are filled by similar gubernatorial procedures.[6]

In fact, the issue's importance extends to all fifty states because it throws into sharp focus fundamental principles of American government and the nature of the judicial office. These principles are unavoidably raised by the holding of the Sixth Circuit that judges are "policymakers" (in this context implying that they are makers of the Governor's policies) and that a governor is "free to make judicial appointments based on political considerations." 9a.

The implications of such a holding for the future of American law is difficult to overemphasize. If state judges are agents of a governor's political policy, then the fundamental concept of separation of powers has been largely eroded, if not eliminated. That concept is central to the legitimacy,

[5] In Ohio, such interim appointments are virtually tantamount to election for full terms, given the efficacy of incumbency in winning elections. See Lawrence Baum, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 Judicature 420 (1983). Moreover, under Ohio law these "interim" appointments may last up to one year before the next election. Ohio Const., Art. IV, § 13.

[6] Besides Ohio, eight states provide for the governor to fill judicial vacancies without any restrictions imposed. The states are: Alabama, Arkansas, North Carolina, Oregon, South Carolina, Tennessee, Washington and West Virginia. Council of State Governments, The Book of the States 1992-93 at 236-43 (Table 4.5). The other states have vacancies filled either by the state supreme court, the legislature, or by the Governor subject to legislative advice or consent, or in conjunction with nominating commissions. Even in many of those states, there are various exceptions to the plans which permit governors to fill certain judicial vacancies subject to no restraints. *Id.* It is also worth noting that many state judges, no matter what the formal election or election system, first obtain office by being appointed to fill vacancies. Glenn R. Winters, *Selection of Judges — An Historical Introduction*, 44 Tex. L. Rev. 1081, 1087 (1966).

under democratic theory, of the courts themselves. If courts, and the law, are not essentially autonomous, but are instead instrumentalities of the Executive, then they provide no effective check to Executive power.

B. Confusion Abounds in Lower Courts.

These important issues deserve uniform resolution at a national level. Instead, confusion and uncertainty abound. At least two major threshold questions, discussed in the decisions below, and by other similar decisions, are now clouded by ambiguity.

First, the two Courts below in this very case, although agreeing on the result, applied two different tests. The Sixth Circuit, unlike the District Court, assumed the continuing viability of a "policymaking" exception to patronage hiring. The District Court expressly stated that *Branti* replaced the policymaker exception of *Elrod* with a test of whether "party affiliation is an appropriate requirement for the effective performance of the public office involved." 445 U.S. at 518. The District Court tacitly recognized that this holding was reiterated by *Rutan*, 497 U.S. at 64, 71 n. 5 and indeed had been acknowledged by the Sixth Circuit in *Faughender*. The Sixth Circuit below acknowledged the new test. See 6a. But it did not apply it.

Thus, despite this reaffirmation, the Sixth Circuit, inexplicably, found that a general policymaking exception survives *Branti* and *Rutan*, and that it applies to appointment of judges. 7a.-9a. The same confusion is found in other courts, as well. *Kurowski* v. *Krajewski*, 848 F.2d 767, 770 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988); *Garretto* v. *Cooperman*, 510 F. Supp. 816, 819-20 (S.D.N.Y. 1981), *aff'd mem.*, 794 F.2d 671 (2d Cir. 1984) (table). These various holdings, if left unreviewed, obviously will compound the confusion regarding the precise scope of the exception to the prohibition against patronage hiring and firing.[7]

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[7] The uncertainty is manifest in the views of commentators. *Compare*

Second, compounding the ambiguity and uncertainty is the fact that *Elrod*, *Branti* and *Rutan* involved present or potential employees within the same branch of government as the appointing authority. *None involved cross-branch appointments, as in this case.* But the Sixth Circuit failed to discuss the implications of cross-branch appointments to either the policymaking or political affiliation tests. Nor are other decisions clear on this point. *See Kurowski* v. *Krajewski*, 848 F.2d at 770; *Pounds* v. *Griepenstroh*, 970 F.2d 338, 342-43 (7th Cir. 1992) (noting uncertainty on this issue). *See generally Branti*, 445 U.S. at 533, n. 20 (Powell, J., dissenting) ("the public defender may no longer be chosen by the County Legislature on a partisan basis"); *Rutan*, 497 U.S. at 92-93 (Scalia, J., dissenting) (assumes application to judicial appointments).

The divergent and uncertain views of federal judges in different circuits mean that it is essential to have a uniform resolution of the applicability of *Elrod*, *Branti* and *Rutan* to judicial appointments. This is underscored by the concurring opinion of Judge Jones in the Court below. Judge Jones was clearly troubled by "the process of using political affiliation as *the exclusive* means of appointing judges", 13a (emphasis in original) and he ended his opinion by observing that:

> Although the present state of First Amendment jurisprudence may deem such a practice constitutional, the Governor's present practice makes me wonder whether the federal judiciary ought to reassess

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Susan Martin, *A Decade of Branti Decisions: A Government Official's Guide to Patronage*, 39 Am. U. L. Rev. 11, 29-31 (1989) (most cases reject broad exception) and *The Supreme Court, 1989 Term*, 104 Harv. L. Rev. 129, 234-35 (1990) (*Branti* definition of exception applies after *Rutan*) *with* Casenote, 23 Ariz. St. L. J. 1137, 1142-44 (1991) (arguing that policymaking test survives *Rutan* and that it would encompass judges) and Casenote, 11 N. Ill. U. L. Rev. 375, 400-08 (1991) (arguing that *Branti* exception is unclear after *Rutan*).

> the propriety of the First Amendment analysis as stated in *Rutan* as it relates to this type of case.

Id., 14a.

These remarks by Judge Jones confirm that, until this Court clearly instructs them, lower federal courts will flounder in uncertainty about the proper application of *Elrod*, *Branti* and *Rutan*.

II.

THE COURT BELOW HAS DECIDED A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Sixth Circuit erred in holding that the First Amendment rights of Petitioner were not violated when the Respondent Governor systematically excluded Petitioner and all non-Republicans from consideration. The Sixth Circuit was mistaken in at least two respects.

First, the Court acknowledged, but did not apply, the "political affiliation" exception as formulated by *Branti* and reaffirmed in *Rutan*; second, even if some sort of "policymaking" exception survived *Branti* and *Rutan*, an Ohio judge surely is not a maker of the Governor's political policy, as Judge Jones readily acknowledged.

A. The Sixth Circuit Applied a Test Revoked by this Court.

As the Sixth Circuit correctly recognized, this Court in *Elrod*, *Branti* and *Rutan* held that political patronage hiring

and firing practices effectively deprive present or prospective governmental employees of their right freely to express their political views. But such hiring and firing is not absolutely banned. To "insure that policies which the electorate has sanctioned are effectively implemented," the *Elrod* Court held that the prohibition did not apply to "policymakers," 427 U.S. at 372, that is, an "employee [who] acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368. But, as noted above, in this Petition, the *Branti* Court replaced the *Elrod* exception, stating instead:

> In sum, the ultimate inquiry is not whether the label "policymaker" or "confidential" fits a particular position; rather the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved. 445 U.S. at 518.

This formulation was followed in *Rutan*, 497 U.S. at 64, 71 n.5.

The exception as formulated in *Branti* clearly does not permit the partisan appointment of state judges. The reasons are straightforward. It is beyond argument that judges, to properly discharge their functions to enforce law, must be free from the influence of the other branches of government. Once appointed, a judge must enforce the law and not the judge's own political preferences, much less the political policies of the appointing authority.[8]

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[8] Ohio law is insistent about the non-partisan character of judicial decisionmaking, *e.g.*, *State, ex rel. Weinberger* v. *Miller*, 87 Ohio St. 12, 47-48, 99 N.E. 1078, 1085 (1912). Indeed, prior to 1851 the Ohio legislature appointed all judges. The Ohio constitution was changed in that year to provide for the election of judges, with interim vacancies to be filled by gubernatorial appointment. The concern driving the change was "that judicial office had become the spoils of party conflict and that appointments were not made on a basis of ability or fitness, but as a reward for party service." Francis R. Aumann, *The Selection, Tenure, Retirement and Compensation of Judges in Ohio*, 5 U. Cin. L. Rev. 408, 409 (1931).

Partisan decisionmaking is, of course, appropriate and necessary to implement policies in the executive and legislative branches. But it is utterly antithetical to fundamental concepts of proper judicial functioning. The separation of powers, Canons of Judicial Ethics, and ultimately the Due Process Clause, e.g., *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 820-25 (1986); *Ward* v. *Village of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972), require that a judge be free from bias and without favoritism with respect to any person or group regardless of their political views.[9]

If, as stated in *Elrod*, *Branti*, *Rutan* and those lower Court decisions which follow them, the Executive's patronage appointments are limited even within the Executive Branch, there is a stronger reason to restrict (if not entirely prohibit) them with respect to other branches, especially the judicial branch. Party affiliation is not and cannot be an appropriate requirement for the effective performance of a judgeship. At least two federal judges have reached this conclusion. *See Rutan*, 497 U.S. at 92-93, wherein Justice Scalia in dissent said:

> ". . . if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable."

See also Garretto v. *Cooperman*, 510 F. Supp. at 819 (Leval, J.)[10]

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[9] The unfortunate fact that some judges may occasionally depart from this model does not lessen the force of this requirement for present purposes, since it is the nature of the office to be examined, not the behavior of any given officeholder. *See Faughender* v. *City of North Olmsted, Ohio*, 927 F.2d 909, 913 (6th Cir. 1991) (citing numerous cases); *Pounds* v. *Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992).

[10] Other federal judges have reached this conclusion, *E.g.*, Arthur S. Alarcon, *Political Appointments and Judicial Independence: An Unreasonable Expectation*, 16 Loy (L.A.) L. Rev. 9, 13 (1983). *Compare*

The Sixth Circuit's contrary decision is incorrect, as is its heavy reliance on the Seventh Circuit's deeply flawed opinion in *Kurowski*. The *Kurowski* Court's discussion of gubernatorial judicial appointments was incidental, since the appointments at issue were of public defenders, not judges. The *Kurowski* Court found that the fact that a public defender (like other lawyers) could be appointed to serve as a judge pro tempore, did not make them policymakers. 848 F.2d at 769. *Kurowski* was decided prior to *Rutan* and while it cited *Branti*, it completely failed (as did the Sixth Circuit below) to apply the *Branti* exception to the facts of the case. In addition, in *Kurowski* the Court's discussion of judges as "policymakers" disassociates that function from the source of the appointment, forgetting that the problem at hand is the patronage appointment of subordinate officials by the elected appointing authority, an authority who "punishes" those whose views do not conform to his own. The question is not who, in the abstract, are "policymakers," but what relationship to the appointing authority is so important as to justify encroaching on the First Amendment rights of others.

For similar reasons, the reliance of the Court below on this Court's decision in *Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991), 8a., is misplaced. There, this Court held that state judges fell under an exception in the Age Discrimination in Employment Act (ADEA) for "an appointee on the policymaking level." 29 U.S.C. § 630(f). That conclusion followed from statutory construction not relevant to First Amendment jurisprudence. Moreover, the care taken in *Gregory* to distinguish between "policymaking" and what is a "policymaking level" as a matter of rank, confirms the ambiguities inherent in using "policymaking" as a test.

First Amendment principles demonstrate that a "policymaking" test does not satisfy common sense. To justify

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Clarence Thomas, *Transition From Policymaker to Judge — A Matter of Deference*, 26 Creighton L. Rev. 241 (1993).

a burden on free speech, the "patronage practices must be narrowly tailored to further vital government interests[.]" *Rutan*, 497 U.S. at 74. But, as the *Branti* Court stated, patronage (i.e., political purposes) and "policy" purposes often do not coincide. Many "policy" decisions have nothing to do with political objectives; many "policymakers" in government are far removed from implementation of a political platform. Therefore, a "policymaking" test is not a rational exception connected to the general rule.

Instead, as *Branti* recognized, First Amendment rights can only be subordinated when the government duties to be performed are directly related to the policial agenda of the appointing authority. In other words, a Governor's need to carry out his or her political agenda may override the First Amendment if the means utilized are "narrowly tailored." Thus the Governor must be free to fill those positions which, by their nature, are important to executing the political purposes for which he or she was elected.

B. The Sixth Circuit Applied the Wrong Test in the Wrong Way.

Even assuming for argument's sake that, in some formulation, a remnant of "policymaking" survived the *Branti* recasting of the test, the question would become whether or not an Ohio Common Pleas judge is a policymaker of the Governor, i.e., that the proper function of the judicial office is to carry out the Governor's political agenda.

Despite the explicit demonstration in the record that Ohio judges are elected on a nonpartisan ballot; despite the requirements of their Code of Judicial Conduct; despite the decisions of the Supreme Court of Ohio that judges must be independent and impartial; despite the sublime expressions across American history that we have a government of laws and not of men, the Sixth Circuit held that Ohio judges are somebody's policymakers. Clearly the panel was not of one mind as to what that meant. Judge Keith said that judges

make policy because "their political beliefs influence and dictate their decisions on important jurisprudential matters." Judge Jones found it possible to concur and at the same time to state that judges are not policymakers of the appointing Governor. But if not of the Governor, of whom? If judges formulate their own policies, what relevance does that have to shaping an exception for the Governor's political patronage appointments at the expense of First Amendment rights?

Judge Jones would permit using political affiliation as "a factor" but said that is "drastically different" from using political affiliation as "an exclusive means" of appointing judges. But the latter is exactly what the Respondent Governor does.

Even if it is conceded that a governor may take into consideration the overall judicial or political philosophy of an appointee, there is no evidence in this case that the Governor, in making appointments, even inquired into, much less relied upon, the types of policies an applicant would implement. Certainly no such inquiry was made of Petitioner. Nor could it have been because Petitioner (and all non-Republicans) were barred at the door. Certainly, the Respondent produced no evidence to demonstrate, as *Branti* requires, that political affiliation is an appropriate requirement for the judicial office. See 445 U.S. at 518, quoted above.

In Ohio the successful Republican applicant is for all practical purposes chosen by the Republican County Chairman, not by the Governor. For the Respondent Governor, no inquiry into ideas or philosophy is necessary. All that matters is party affiliation and the party chairman's endorsement.

CONCLUSION

The Respondent Governor's judicial appointments are crucial to the proper functioning of Ohio's judicial system. His systematic exclusion of members of all parties other than his own from any consideration for appointment violates this Court's decisions with respect to patronage hiring. Fundamental questions of American government are presented by Respondent's practices and similar practices in many other states. Relevant decisions in the Sixth and other Circuits are ambiguous and confused. For these reasons, this Court should grant this Petition and review the decision of the Sixth Circuit below.

Respectfully submitted,

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APPENDIX

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 92-3345

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT B. NEWMAN,
Plaintiff-Appellant,

v.

GEORGE VOINOVICH,
Defendant-Appellee.

ON APPEAL from the United States District Court for the Southern District of Ohio

Decided and Filed February 22, 1993

Before: KEITH, KENNEDY, and JONES, Circuit Judges.

KEITH, Circuit Judge, delivered the opinion of the court. KENNEDY, Circuit Judge (p. 10a herein), and JONES, Circuit Judge (pp. 10a-14a herein), delivered separate concurring opinions.

KEITH, Circuit Judge. Appellant Robert Newman, appeals the dismissal of his cause of action alleging that Governor George Voinovich's judicial appointment practices violates his rights under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Ohio Constitution. The appellant also appeals the court's dismissal of his motion for injunctive relief. For the reasons stated below, we **AFFIRM.**

I.

Governor Voinovich, a Republican, makes interim judicial appointments pursuant to a procedure devised by his executive assistant. The procedure requires the assistance of Republican Party County Chairpersons to assist the Governor with the selection of judges and is coordinated by Andrew J. Futey, the Governor's Special Assistant for Boards, Commissions and Judges. Specifically, the Republican Chairpersons are asked to submit to the Governor the names and resumes of a minimum of two qualified individuals for consideration as temporary appointments for vacant judgeships within their respective counties. Of the qualified candidates to be submitted, at least one is to be a woman or a minority, if possible. The Chairpersons are also instructed to follow local party guidelines for recommending candidates for judicial appointments and to have the candidates screened by local bar associations. Only Republican County Chairpersons are asked to recommend candidates. Once the names of the candidates are forwarded to the Governor's Office, Futey has the sole responsibility of screening the candidates and making a recommendation to the Governor. Prior to making his recommendation, Futey requires the candidates to fill out background questionnaires, which are sent to the State Highway Patrol for background checks.

In late January 1992, it was announced that Norman Murdock was planning to resign from his post as Hamilton County Common Pleas Judge. After learning of Judge Murdock's planned resignation, James Robinson, Newman's law partner wrote a letter to the Governor requesting that Newman be considered as Judge Murdock's replacement. Futey concedes that he did no more than simply read Robinson's letter and Newman's resume. In fact, Futey testified that only under exceptional circumstances are candidates considered whose names are not submitted by Republican Chairpersons. Futey ultimately recommended Arthur Ney, Hamilton County Prosecuting Attorney, as Judge Murdock's replacement. Ney's name was submitted to the governor by the Republican Party

County Chairperson for Hamilton County. The Governor stipulated before trial that Ney would be his appointment for the Hamilton County Common Pleas Judge vacancy.

Appellant Newman is a practicing attorney and a registered Democrat in Hamilton County, Ohio. He challenged the Governor's judicial appointment practices as a violation of his rights to freedom of belief and association as guaranteed by the First and Fourteenth Amendment to the United States Constitution, and Article I, Section 11 of the Ohio Constitution. Newman also alleged that the Governor's judicial appointment practices violated his rights under the Voting Rights Act, 42 U.S.C. § 1973, and sought to enjoin the Governor from making appointments to fill any judicial vacancies within the state. In an opinion and order of March 31, 1992, the United States District Court for the Southern District of Ohio dismissed Newman's Voting Rights Act claim on the ground that Newman lacked standing to bring such a challenge because he is not a minority or an "aggrieved person" covered under the Act.[1] The court also dismissed Newman's freedom of association cause of action under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 11 of the Ohio Constitution for failure to state a claim upon which relief could be granted. The district court also dismissed Newman's motion for injunctive relief. This timely appeal followed. We discuss the district court's dismissal of Newman's freedom of association claim and his request for injunctive relief seriatim below.

II.

Newman contends that the Governor's judicial appointment process, as employed to fill the vacancy created by Judge Murdock's retirement, violates his rights of free speech

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[1] Newman does not appeal this aspect of the district court's decision. Accordingly, our ruling in this case does not address the merits of whether the district court erred in dismissing this aspect of Newman's claim or whether the Governor's judicial appointment practices violate the Voting Rights Act.

and association under both the United States and Ohio Constitutions. In this appeal, Newman challenges the district court's dismissal of his constitutional challenges to the Governor's practice of appointing only Republicans to fill interim judicial vacancies.

We review the F.R.C.P. 12(b)(6) dismissal of appellant's constitutional claims *de novo*. *American Eagle Credit Corp.* v. *Gaskins*, 920 F.2d 352, 353 (6th Cir. 1991). Specifically, this Court is to "take plaintiff's factual allegations as true and if it appears beyond doubt that the plaintiff can prove no set of facts in support of its claims that would entitle it to relief, then the dismissal was proper." *Id.*

Pursuant to Art. IV, Section 13 of the Ohio Constitution, Governor Voinovich routinely appoints judges recommended by Republican County Chairpersons to fill vacant judgeships. Article IV, Section 13 provides in pertinent part:

> **Vacancy in office of judge, how filled.**
> In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified . . . .

Ohio Const. art. IV, § 13. In *State ex rel., Hoyt* v. *Metcalfe*, 88 N.E. 738 (Ohio 1909), the Ohio Supreme Court explained the judicial appointment provision of Article IV, Section 13, noting that "the office of judge is en elective office, an office that is to be filled by the people." *Id.* at 742. The court also stated that the office of judge "is not an appointive office to be filled by any other authority save to the extent necessary to prevent a lapse." *Id.*

In support of his challenge to the Governor's judicial appointment practices, Newman relies on a trilogy of United States Supreme Court decisions: *Elrod* v. *Burns*, 427 U.S. 347 (1976); *Branti* v. *Finkel*, 445 U.S. 507 (1980); and *Rutan* v. *Republican Party of Illinois*, ____ U.S. ____; 110 S. Ct. 2729 (1990). In *Elrod*, the Supreme Court addressed the question

of whether public employees could be terminated or threatened with termination solely based on their political affiliation. The *Elrod* Court held:

> Patronage . . . to the extent that it compels or restrains belief and association, is inimical to the process which undergrids our system of government and is "at war with the deeper traditions of democracy embodied in the First Amendment."

Elrod, 427 U.S. at 357. Despite its general pronouncement against patronage dismissals, the Court went on to note that the "prohibition on encroachment of First Amendment protections is not absolute." *Id.* at 360. Specifically, the Court explained that "there is a need to insure that policies which the electorate has sanctioned are effectively implemented" and that this "interest can be fully satisfied by limiting patronage dismissals to policymaking positions." *Id.* at 372. The Court further observed that "[i]n determining whether an employee occupies a policymaking position, consideration should be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id.* at 368.

In *Branti* v. *Finkel*, The Court elaborated on the "policymaking" exception to patronage dismissals articulated in *Elrod*, noting that:

> the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518. In *Rutan* v. *Republican Party of Illinois*, the Court held that "the rule of *Elrod* and *Branti* extends to promotion[s], transfer[s], and hiring decisions based on party affiliation and support." *Rutan*, 110 S. Ct. at 2739.

This Circuit embraced the principle established in *Elrod* and its progeny in *Faughender* v. *Olmsted*, 927 F.2d 909 (6th Cir. 1991).

With respect to Newman's claim that the Governor's judicial appointment practices violates his right to freedom of belief and association under the United States and Ohio Constitutions, the district court held that Newman did not state a claim upon which relief could be granted because *Elrod*, *Branti* and *Rutan* do not apply to gubernatorial appointments. We disagree with the district court's holding that gubernatorial appointments do not fall within the principle of *Elrod*, *Branti*, and *Rutan*. There is no meaningful distinction between "hiring decisions" for a public position as discussed in *Rutan* and making an "appointment" to a public position as presented here. An "appointment" is merely a type of "hiring decision." The overriding theme in *Elrod*, *Branti* and *Rutan* is that the First Amendment places significant limitations on the ability of government officials to make decisions affecting public employment based on considerations regarding an employee or prospective employee's political belief and association. Specifically, what *Elrod*, *Branti* and *Rutan* establish is that political patronage should play no role in government decisionmaking regarding non-policymaking public employment positions. We do not believe that by extending the principle of *Elrod* and *Branti* beyond terminations and threats of termination to promotions, transfers, recalls, and hiring decisions, the Court intended to exempt "appointments" to public office from this principle. Therefore, the constitutionality of the Governor's judicial appointment practices must be assessed in light of this principle.[2]

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[2] The Governor argues that the Supreme Court's reasoning in *Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1 (1982), is controlling here. In *Rodriguez*, the Supreme Court upheld a Puetro Rico statute which vested in a political party the authority to appoint interim replacements to fill vacancies in the legislature created by one of its own members. In rejecting the plaintiffs' constitutional challenges to the interim legislative process, which

In *Kurowski* v. *Krajewski*, the Seventh Circuit addressed the question of whether political beliefs may be the basis for the appointment of judges *pro tempore* under Indiana law. 848 F.2d 767 (7th Cir. 1988), *cert. denied*, 488 U.S. 926 (1988). The specific issue presented in *Kurowski* was whether a state judge with the authority to appoint assistant public defenders as judges *pro tempore*, was thereby vested with the authority to terminate assistant public defenders whose political beliefs differed from his. The court answered this question in the negative, stating that the dismissal of public defenders because of their political affiliation was a violation of their first and fourteenth amendment rights. The court noted that "public defender and judge *pro tempore* are not the same job" and that unlike judges *pro tempore*, public defender positions cannot be filled based upon political affiliation. *Kurowski*, 848 F.2d at 770-771. In distinguishing the policymaking role of a judge from the non-policymaking role of a public defender, the court wrote:

> A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions.

Kurowski, 848 F.2d at 770.

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included a freedom of association claim, the Court noted that "[n]o provision of the Federal Constitution expressly mandates the procedures that a state or the Commonwealth of Puerto Rico must follow in filling vacancies in its own legislature." *Rodriguez*, 457 U.S. at 8.

While we recognize that there are close similarities between the issue presented in *Rodriguez* and the issue in the instant case, we do not believe *Rodriguez* provides the proper framework for analyzing the instant dispute. We think the Supreme Court's reasoning in *Elrod*, *Branti* and *Rutan* provides the appropriate framework for assessing the merits of the constitutional claims raised by Newman. Furthermore, members of the legislature are policymakers within the policymaker exception of *Elrod* and *Branti*.

The *Kurowski* court specifically rejected the argument that because judges must be non-partisan decisionmakers, political affiliation should not be considered in making judicial appointments. The court stated:

> If this is so then, for example, the governor could not consider a would-be judge's politics when deciding whom to appoint (because the judge is independent of the governor once in office), and the President could not consider the views of a prospective appointee to the Federal Trade Commission when making that selection. Neither *Elrod* nor *Branti* makes anything turn on the relation between the job in question and the implementation of the appointing officer's policies.

Kurowski, 848 F.2d at 770. We agree with the holding in *Kurowski* that judges are policymakers because their political beliefs influence and dictate their decisions on important jurisprudential matters. *See also Gregory* v. *Ashcroft*, 111 S. Ct. 2395 (1991) (holding that state judges are employees at the "policymaking level" under the Age Discrimination Employment Act). Therefore, we believe that Governor Voinovich's appointment of judges based on political considerations is consistent with *Elrod*, *Branti* and *Rutan*. In addressing the issue of appointments based on political considerations, the court stated:

> A governmental officer holding the power of appointment may make any decision he pleases, unless the Constitution bars the way. The pertinent provision — the guarantee of free speech contained in the first amendment — disables the government from firing a person based on his speech and political beliefs (and thus penalizing the employee for holding or advocating those beliefs) unless the beliefs are relevant to the job in question. They will be relevant, the Court said in *Branti* and *Elrod*, when the office involves making on the state's behalf the sort of decisions about

> which there are political debates. That is to say, the first amendment does not remove political beliefs from politics; it would undermine the democratic process to hold that the winners at the polls may not employ those committed to implementing their political agenda.

Kurowski, 848 F.2d at 770. Accordingly, we hold that gubernatorial appointments to public positions are governed by the principle of *Elrod*, *Branti* and *Rutan*. With respect to gubernatorial appointments to the state judiciary, we hold that judges are policymakers within the meaning of *Elrod* and *Branti*. Therefore, Governor Voinovich is free to make judicial appointments based on political considerations.

Despite our holding in this case, we are troubled by the Governor's practice of considering only members of his party in making appointments to fill interim judicial vacancies. While this practice may be constitutional, we believe it is unwise. Though we recognize that the office of state judge has a political and policymaking component, we fail to see the necessity of an exclusionary appointment practice which makes political party affiliation a prerequisite for judicial service.

III.

Appellant contends that the district court's denial of his request for a preliminary injunction was improper because is left him with no prospects of ever being considered for a judicial appointment by a Republican governor. However, because Newman does not have a claim upon which any relief can be granted, we need not review the district court's denial of his claim for a preliminary injunction.

IV.

For the foregoing reasons, we **AFFIRM** the decision of the Honorable George C. Smith, United States District Judge for the Southern District of Ohio.

KENNEDY, Circuit Judge, concurring.

I concur in all of Judge Keith's opinion except the last paragraph in Part II where he writes that the Court believes that the practice of appointing judges only from the governor's party in making judicial appointments is unwise. Whether it is wise or unwise is not submitted to us for decision. The citizens of the State of Ohio have given the power to appoint interim judges to their elected governors. The wisdom of the governors' policies will be judged in the voting booths.[1]

NATHANIEL R. JONES, Circuit Judge, concurring. While I generally agree with and am pleased to join Judge Keith's compelling opinion in this case, I write separately to note my interpretation of First Amendment law in this area and to express my concerns with the current practice of Ohio's Governor regarding interim judicial appointments.

Judge Keith's majority opinion makes a persuasive argument for expanding or illuminating the phrase "hiring decisions," as stated in *Rutan* v. *Republican Party of Ill.*, 110 S. Ct. 2729, 2739 (1990), by including gubernatorial appointments within the contours of that phrase. I think that it is correct to conclude that, in general, a gubernatorial appointment is merely a type of hiring decision.

After determining that gubernatorial appointments fall within the meaning of "hiring decisions," the issue then becomes whether a governor's interim judicial appointments may be made based on party affiliation. As Judge Keith's opinion notes, the present analysis used in this area of First Amendment jurisprudence requires the courts to determine

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[1] The practice of appointing judges of the same party as the appointing officer is undisputed and is used by both major parties. The record discloses that the previous Ohio governor, a Democrat, appointed only members of the Democratic party. The present governor, a Republican, has appointed only two Democrats. On the federal level, presidents have appointed almost exclusively members of their own party and have campaigned on the issue of judicial appointments.

whether a position of public employment is a "policymaker" position. In addition, the opinion allows that the ultimate inquiry is whether the Governor can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Judicial appointments present an interesting twist on that analysis. For example, while a judge may be a "policymaker" in a broad sense, a judge is not a "policymaker" for the appointing governor. Rather, the judiciary is an independent arm of the government, unconnected by oath or duty to the governor's office or political party. Once appointed, a judge does not and should not answer to a governor's directives or opinions. Therefore, the link between an appointee judge and the appointing governor is fundamentally different from the link between a governor and other gubernatorial appointees who are appointed to fulfill the political or policy objectives of a governor. Although it discussed the constitutionality of having judges on a non-partisan ballot, the Ohio Supreme Court, in *State ex rel. Weinberger* v. *Miller*, 99 N.E. 1078, 1086 (Ohio 1912), provided eloquent language highlighting the difference between the judiciary and other branches of government:

> Legislative and executive officers are selected for the avowed purpose of promulgating definite principles and methods of government advanced by [their] respective parties . . . . No partisan political platform can be written for the judge. He is charged with the interpretation and the administration of the law as he finds it. He has no voice in framing it. He must not depart from the plain provisions thereof, no matter how much he may be opposed to the principles or purposes of it. In the discharge of his duty, a judge is not concerned with party platforms or party expediency. *In his official capacity he can serve no party, promulgate no partisan theories of government, encourage no partisan economic measures.*

(Emphasis added.)

Similarly, it cannot be seriously contended that being a member of a certain party, in this case the Republican Party, should be a requirement for the *effective performance* of being a judge. *See Rutan*, 110 S. Ct. at 2746 (Scalia, J., dissenting) ("if there is any category of jobs for whose performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable").

Notwithstanding the above, persons elevated to the bench do not leave their ideals, life experiences, and political philosophies behind. Consider the reflections of the late Justice Benjamin Cardozo:

> There has been a certain lack of candor in much of the discussion . . . or perhaps in the refusal to discuss it, as if judges must lose respect and confidence by the reminder that they are subject to human limitations. I do not doubt the grandeur of the conception which lifts them into the realm of pure reason, above and beyond the sweep of perturbing and deflecting forces. None the less, if there is anything of reality in my analysis of the judicial process, they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do. The great tides and currents which engulf the rest of man do not turn aside in their course and pass judges by.

Benjamin N. Cardozo, *The Nature of the Judicial Process*, 167-68 (1921). Almost every decision rendered by a judge has been influenced by various factors, including one's general philosophy on the implementation and interpretation of the law. *See Kurowski* v. *Krajewski*, 848 F.2d 767, 770-71 (7th Cir.), *cert. denied*, 488 U.S. 926 (1988). This is not to say that a judge may set one's own agenda or create one's own policies; however, it would ignore reality to suggest that a judge is not influenced by an infinite number of factors. "If you ask how [the judge] is to know when one interest

outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself." *Id.* at 113. Moreover, as a direct result of those factors, a judge does create a particular brand of governmental policy.

Any person charged with the appointment of a member of the judiciary should be aware of those factors which may suggest how a person may treat an issue. That person should not be prevented from choosing a prospective judge based on that prospective judge's general views on the implementation and interpretation of the law. In Ohio, it is the governor who is charged by the Ohio Constitution with appointing interim judges, *see* Ohio Const. art. IV, § 13. Therefore, a governor should be free to choose persons who share (or do not share) his/her general philosophy on the implementation and interpretation of the law.

In determining a prospective judge's general philosophy, a governor should be able to look at various aspects of that person's life. Undoubtedly, there are in infinite number of ways to determine a judge's general philosophy. Party affiliation may provide some insight to the types of philosophies a prospective judge maintains. As a result, I absolutely agree with Judge Keith that political affiliation may be *an appropriate factor* to consider when making interim judicial appointments.

In addition, because I find that judges are unique types of "policymakers" and that party affiliation may be *an appropriate factor* to consider when making a judicial appointment, I find that the general philosophy underlying *Rutan* does allow a governor to make judicial appointments with party affiliation in mind.

Nonetheless, I am gravely troubled by the Ohio Governor's practice of considering or appearing to only consider members of his own party in filling these vacancies. Using political affiliation as a *factor* in filling appointments is drastically different from using political affiliation as *an exclusive means* of appointing judges. The latter appe s to be this case by virtue of the requirement of aspirants to solicit

the favor of a political organization. The operative system of routing prospective judicial appointees through a political organization is reminiscent of Tammany Hall (the headquarters of the Tammany Society of New York, a political organization which sought municipal political control by methods associated with corruption and bossism), from which candidates for political office were required to obtain validation. While I am not implying that the Governor's use of Republican county chairpersons be equated with the big bosses of Tammany Hall, the process of using political affiliation as *the exclusive means* of appointing judges certainly has the tendency to reinforce that perception. Although the present state of First Amendment jurisprudence may deem such a practice constitutional, the Governor's present practice makes me wonder whether the federal judiciary ought to reassess the propriety of the First Amendment analysis as stated in *Rutan* as it relates to this type of case.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C2-92-248

ROBERT B. NEWMAN,

Plaintiff,

v.

HON. GEORGE VOINOVICH,

Defendant.

OPINION AND ORDER

(Filed March 30, 1992)

This case presents before the Court the question whether the failure to consider for appointment, or the denial of an appointment, to an individual by the governor of the state to sit as a state judge because of that individual's partisan political affiliation violates the individual's rights under the First and Fourteenth Amendments of the United States Constitution; Article I, §11 of the Ohio Constitution; and, the Voting Rights Act, 42 U.S.C. § 1973.

Currently pending before the Court is a motion for a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. Also before the Court is a motion by the defendant requesting the dismissal of the complaint as it relates to the Voting Rights Act. A hearing was held before the Court on March 26, 1992, wherein the respective pending motions were argued.

It should be noted from the outset, that while this matter has all the makings of a politically based, Democrats v. Republicans, confrontation, in fact the issue before this Court is a constitutional issue and not a political issue, although in these times the differences are often blurred for political gain. The political affiliations of the governor, the proposed appointee, and the plaintiff are only relevant insofar as the

governor of the state and the proposed appointee are of the same party, to the exclusion of the individual desiring the appointment due to his or her antithetic political party affiliation.[1] If the act of placing considerable weight upon the candidate's political affiliation when appointing vacancies in the judiciary is deemed unconstitutional, then it will be unconstitutional for the current Republican governor just as will be unconstitutional for a subsequent Democratic governor.

I.

The Plaintiff Robert B. Newman brought this suit against the Governor of the State of Ohio, Governor George Voinovich. Newman seeks to have this Court declare the judicial appointment practices of the governor violative of the United States Constitution,[2] the Ohio Constitution and the Voting Rights Act. Newman further seeks to have this Court restrain the Governor, specifically, from appointing a successor to a seat in Hamilton County, Ohio, that the parties have stipulated will be opening on April 1, 1992, and generally, from appointing judges to any vacancies in the State of Ohio until a process is put in place that does not run afoul of the United States Constitution, the Ohio Constitution and the Voting Rights Act. Plaintiff Newman requests and proposes that a nonpartisan nominating committee be put in place in each county in Ohio for the purpose of considering all qualified and interested individuals for judicial appointment, without regard to the individual's political affiliation or race.

[1] To this end, the plaintiff at the hearing professed that he likewise found it inappropriate that the previous governor, a Democrat, appointed only Democrats to judicial vacancies.

[2] "It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." *Board of Education v. Barnette*, 319 U.S. 624, 639 (1943).

II.

This case is a challenge to the appointment process provided for in the Ohio Constitution for the placement of judges due to vacancies at mid-term in the State of Ohio. Under Article IV, Section 13 of the Ohio Constitution, the Governor of the State of Ohio has the power to appoint individuals to fill vacancies in judgeships in a court in the State of Ohio.

The Governor for the State of Ohio is Defendant George Voinovich. He is a registered Republican and was elected to his current position on the Republican party ticket. Pursuant to the Ohio Constitution, the responsibility of appointing individuals to vacant positions runs to the defendant. The plaintiff in this action, Robert Newman is a registered Democrat, and has run for election as such, however, he was not elected.

The specific position at issue in this case is the position of Hamilton County Common Pleas Judge. The current judge, the Honorable Norman Murdock, will resign from that seat effective April 1, 1992, and will be replaced by appointment of the Governor. It has been stipulated that the current Hamilton County Prosecuting Attorney Arthur Ney, a Republican, will receive the appointment.

In 1851 the framers if the Ohio Constitution extinguished a system of pure judicial appointment and opted for a system whereby the judges are elected and interim vacancies were filled by appointment of the governor. Ohio Const. art. IV, § 13. Ironically, this change was the result of a system wrought with chaos due to a massive turn over of judges each time a new political party controlled the legislature and because of the political patronage abuses that were becoming commonplace. Therefore, from 1851 to the present time, the appointment of judges has been limited to those occasions where a vacancy occurs mid-term, then the appointee must run for election as the term ends if he or she wishes to retain the seat. These are precisely the vacancies for which we concern ourselves today. Under the current system there are no

enunciated limitations in the Ohio Constitution to the governor's power of appointment.

This system of gubernatorial appointments and incumbent retention was challenged in 1938 and again in 1987. At those times there was an effort to amend the Ohio Constitution to alter the methods by which judges are both appointed and retained. These efforts were defeated and the methods of appointment and election remain unchanged.

At the hearing for the preliminary injunction, the special Assistant to the Governor for Boards, Commissions and Judges, Andrew J. Futey, testified as to the procedures followed by the state when notified that a vacancy for a judgeship will occur. It was his testimony that upon learning of a vacancy he would contact the Republican Party Chairperson in the county where the vacancy has occurred to request recommendations. This was pursuant to the Judicial Procedures Manual, Step 2, as prepared by Mary Beth Marcholz, Assistant Deputy Legal Counsel ("Judicial Procedural Manual"),[3].

The actual contact to the Republican Party County Chair person is made via letter sent under the signature of Governor Voinovich, wherein the governor states that he "want[s] to find the best and brightest, achieve demographic balance and select individuals who can be re-elected to the bench."[4] To that end the letter sets out the procedures to follow in nominating candidates for the governor's consideration. The letter asks that the county chairperson follow the current guidelines for the nomination of candidates for appointment as provided for by the local party rules, if any. The letter further provides that if there are no local party nominating guidelines they should "contact the chairman of the Ohio Republican party for advice and counsel." The county chairperson is called upon, "[o]n an informal basis. . .", to

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[3] See Plaintiff's Exhibit p-16.

[4] See Plaintiff's Exhibit p-15.

"periodically submit to [the] local bar association the names of individuals being considered for appointment . . . [and] ask the bar if the individual is qualified to fill the post they are being considered for." This is done on a confidential basis. The final request set forth by the Governor is that they submit to him "in writing the names of a minimum of two, preferably three candidates for each post, one of which must be a female or minority."[5] When submitting the names the county chairperson is asked to submit "extensive resumes and all other applicable documents regarding the appointment." It was the testimony of Futey that neither the Democratic Party Chairperson nor the Independent Party Chairperson[6] are contacted by the governor's office for nominations.

The Judicial Procedure Manual provides that "[w]hen deemed necessary, each candidate will be interviewed by the Director of Administration, Stratford Shields, and the Special Assistant to the Governor, Andy Futey." Judicial Procedures Manual at p. 2. Each of the recommended candidates are then called upon to complete a background information questionnaire which is utilized by the Department of Highway Safety so that a thorough background check can be completed. Once all of these steps are completed, Mr. Futey makes a final selection for recommendation to the Governor. The Governor, in turn, "reviews all of the submitted information for each candidate, including resume, interview, and background check and decides whether to approve or disapprove the recommended appointee." *Id.* At no time does the Governor suggest that party affiliation is not taken into consideration, nor could he based upon the facts in this case and the past history of every governor over the last century.[7] In

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[5] It was the testimony of Mr. Futey at his deposition that approximately twenty-five percent (25%) of the time only one name is advanced by the county chairperson, however, at the hearing he testified that seventy-five percent (75%) of the time only one name is advanced.

[6] There was no testimony as to whether an Independent Party Chairperson even exists in Hamilton County.

[7] The one apparent and notable exception is Governor John J. Gilligan.

fact, as noted by the plaintiff, there is considerable historical evidence that the governors of both parties have filled such vacancies on a partisan political basis. *See, e.g.*, Laurence Baūm, *The Electoral Fates of Incumbent Judges in the Ohio Court of Common Pleas*, 66 Judicature 420, 430 (1983); Conference, *The Selection and Tenure of Judges in Ohio*, 8 U. Cin. L. Rev. 359, 414-15 (remarks of Judge Walter Shohl); 421 (remarks of Milton Schmidt); 437 (remarks of Joseph Graydon) (1934). As such, the appointment procedures followed by this gubernatorial administration and virtually every gubernatorial administration preceding it are in question; and the question is whether a governor may properly exclude an otherwise qualified candidate based solely upon that candidate's political affiliation.[8] The Court will now turn its attention to the standard to be applied to the instant matter.

III.

In determining whether a preliminary injunction is appropriate the Court must consider and weigh four factors:

> First, whether the movant has shown a "strong or substantial likelihood or probability of success on the merits";
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> Second, whether the issuance of an injunction will spare the movant from suffering "irreparable injury";
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> Third, "whether the issuance of a preliminary injunction would cause substantial harm to others"; and
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> Fourth, "whether the public interest would be served by issuing a preliminary injunction."

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[8] The Court views this as a constitutional question concerning the procedures utilized, and as such it is not necessary for the Court to reach the specific issue of whether the plaintiff himself is "qualified." For our purposes here we will assume that he is qualified.

Mason County Medical Ass'n v. *Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). *See also, e.g., Frisch's Restaurant, Inc.* v. *Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985); *Martin-Marietta Corp.* v. *Bendix Corp.*, 690 F.2d 558, 564-65 (6th Cir. 1982); *USACO Coal Co.* v. *Carbomin Energy Inc.*, 689 F.2d 94, 98 (6th Cir. 1982); and *Mobil Corp.* v. *Marathon Oil Co.*, 669 F.2d 366, 368 (6th Cir. 1981).

It has long been established that the four factors to be considered are not a "rigid and comprehensive test for determining the appropriatenesss of preliminary injunctive relief." *Friendship Materials Inc.* v. *Michigan Brick, Inc.*, 679 F.2d 100, 102 (6th Cir. 1982). *See also Frisch's*, 759 F.2d at 1263; *Tate* v. *Frey*, 735 F.2d 986, 990 (6th Cir. 1984); and *Roth* v. *Bank of the Commonwealth*, 583 F.2d 527, 537 (6th Cir. 1978), *cert. dismissed*, 442 U.S. 925 (1979). "[T]he four considerations applicable to preliminary injunction decisions are factors to be balanced, not prerequisites that must be met." *In re DeLorean Motor Co.*, 755 F.2d at 1229. "That is, a strong showing of irreparable harm, decidedly outweighing harm to the defendant, may justify an injunction even where the movant cannot make a strong showing of likelihood of success on the merits. . . ." *Worthington Foods, Inc.* v. *Kellogg Co.*, 732 F. Supp. 1417, 1427 (S.D. Ohio 1990) (Kinneary, J.) (citing *Frisch's*, 759 F.2d at 1263).[9] The Court will now turn its attention to the application of the four factors to the case *sub judice*. The first of the four factors is the "likelihood of success on the merits".

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[9] This Court does not apply the "sufficiently serious question going to the merits" standard to the instant case, instead finding that such a standard is limited to Lanham Act cases such as *Frisch's Restaurant, Inc.* v. *Shoney's Inc.*, and *Worthington Foods, Inc. See also Frisch's Restaurants, Inc.* v. *Elby's Big Boy, Inc.*, 670 F.2d 642 (6th Cir.) (Lanham Act case), *cert. denied*, 459 U.S. 916, 103 S. Ct. 231, 74 L.Ed.2d 182 (1982); and *Central Benefits Mutual Ins. Co.* v. *Blue Cross and Blue Shield Ass'n*, 711 F. Supp. 1423 (S.D. Ohio 1989) (J. Graham) (Lanham Act case).

A. LIKELIHOOD OF SUCCESS ON THE MERITS.

In order to address the issue of the movant's likelihood of success on the merits with regard to the underlying claims, the Court must first look to the Plaintiff's stated causes of action. It is based upon these claims that the Court must predict whether the movant's case is meritorious or frivolous, a possibility or impossibility; and in the end the Court must determine some probability, if any, of success on the merits. The two stated causes of action are a violation of the Voting Rights Act and a violation of the First and Fourteenth Amendments of the United States Constitution. Based upon the pending motion for dismissal concerning the Voting Rights Act claim, the Court will entertain that claim first.

1. Voting Rights Act, 42 U.S.C. § 1973

The plaintiff alleges in his complaint that the "appointive actions of the Defendant violates the Voting Rights Act, 42 U.S.C. § 1973, by having a disproportionate impact upon black Americans in Ohio who are interested and qualified to be judicial appointees, and/or who wish to vote for black candidates in judicial elections." In response, the defendant asks that the Voting Rights Act claim be dismissed based upon a lack of standing.

A district court may not dismiss a claim under Rule 12(b)(6) for failure to state a claim unless it is apparent beyond a doubt to the court that the plaintiff can prove no set of facts to support a claim which would entitle him to relief. *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). In determining whether the facts presented in a complaint support a claim upon which relief may be granted, the district court is to liberally construe the facts in the light most favorable to the plaintiff. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins* v. *McKeithen*, 395 U.S. 411, 421 (1969); 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1357, at 594 (1969). The essence of a court's inquiry is to determine whether the allegations contained in the complaint satisfy the mandate of the Federal Rules that the complaint contain "a

short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

At issue in the instant claim is whether standing exists to permit this plaintiff to carry his claim forward. It has long been held that standing "is perhaps the most important of the jurisdictional doctrines," thus placing federal courts under a special obligation to determine the threshhold issue of whether standing exists. *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215 (1990) (citing *Allen* v. *Wright*, 468 U.S. 737, 750 (1984)). For the plaintiff to demonstrate standing under the Voting Rights Act he must demonstrate that (1) he has personally suffered or will suffer some distinct injury-in-fact as a result of defendant's putatively illegal conduct; (2) the injury can be traced with some degree of causal certainty to defendant's conduct; (3) the injury is likely to be redressed by the requested relief; (4) the plaintiff must assert his own legal rights and interests, not those of a third party; (5) the injury must consist of more than a generalized grievance that is shared by many; and (6) the plaintiff's complaint must fall within the zone of interests to be regulated or protected by the rule of law in question. *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471-77 (1982); *see also Allen* v. *Wright*, 468 U.S. 737, 751-52 (1984). Moreover, when, as in this case, the plaintiff is seeking injunctive relief he must establish that he personally faces a realistic, immediate, and non-speculative threat of being prospectively subjected to or harmed by the particular conduct at issue. *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 102 (1983).

The Court finds that the plaintiff has failed to make the required demonstrations. The plaintiff is attempting to shoehorn standing under the Voting Rights Act into the instant case by arguing that he is an "aggrieved person" as provided for under 42 U.S.C. § 1973a, He expounds upon this attempt to obtain standing by providing as follows:

> [T]hat plaintiff has standing to raise the Voting Rights Act claims, in at least two respects. First, plaintiff has

> alleged that his right to vote for black judges has been impaired by the appointive scheme in question. Therefore, while plaintiff is not black, he is an "aggrieved person []" entitled to bring suit under the Act. 42 U.S.C. § 1973a. According to the legislative history of this section (added by the Voting Rights Act of 1975), the provision was meant to codify the Court's decision in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969). That case makes numerous references to voters as plaintiffs without mentioning their race. Also, the legislative history states that an aggrieved person "may be an individual or an organization representing the interests of injured persons." S. Rep. No. 295, 94th Cong., 1st Sess. 1, 40 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 774, 806-07. Significantly, the Report cites *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), a case which held that a white person had standing to raise claims of racial discrimination against nonwhites under the Fair Housing Act. The Fair Housing Act also permits aggrieved individuals "to bring suit." 42 U.S.C. § 3613(a)(1). Circumstances similar to *Trafficante* are present here.
>
> Second and relatedly (sic), plaintiff's status as a class representative empowers him to raise the Voting Rights Act claims herein. The class he seeks to represent includes nonwhite voters and other nonwhite individuals.

In reviewing the pleadings and the responses set forth by the plaintiff at the hearing this Court disagrees with the plaintiff's argument of being an "aggrieved person" and finds no theory set forth by the plaintiff upon which this white male plaintiff may be permitted to advance the rights and interests of the minority population. *See Gladstone Relators* v. *Village of Bellwood*, 441 U.S. 91, 99 (1979).

The extent of the plaintiff's testimony is that he has always been active and interested in seeing minorities elected or ap-

pointed to judicial positions. While this is a meritorious goal, this does not create standing. Furthermore, there has been no testimony that minorities have been excluded from the "processes leading to nomination or election in the state. . . ." 42 U.S.C. § 1973(b). To the contrary, the expressed process of the current governor calls for the county chair to provide three names, one of which must be a minority or a female.

Furthermore, there has been nothing presented to this Court to suggest that minorities are prohibited from running for judicial positions at the time the appointed incumbent judge is running for election, thereby providing the plaintiff and voters an opportunity to vote for a minority candidate. The extent of the plaintiff's testimony as to "exclusion" is that minorities are "reluctant" to run for positions in Hamilton County due to the high rate of incumbency reelection. If in fact there is a high rate of incumbency reelection, that fact would impact minority and majority candidates alike and fails to show any personal suffering or disparate impact upon the plaintiff in particular, and minorities in general.

As such, the Defendant's motion to dismiss the claim under the Voting Rights Act is hereby GRANTED. Therefore, the Court turns its attention to the remaining claims to evaluate the plaintiff's likelihood of success on the merits.

2. First and Fourteenth Amendment of the United States Constitution and the Ohio Constitution.

The most difficult issue presented to this Court is the plaintiff's argument that the selection of judges based upon political affiliation, to the purposeful exclusion of those of any other political affiliation, constitutes a violation of the Ohio Constitution and the First and Fourteenth Amendments of the United States Constitution. The plaintiff acknowledges that this claim is based upon the holding in *Rutan* v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990), and more specifically, upon the dissent filed by Justice Scalia. The Justice, writing his dissent in a 5-4 decision, on behalf of the minority, including Chief Justice Rehnquist, Justice Kennedy and Justice O'Connor provided as follows:

> Today the Court establishes the constitutional principle that party membership is not a permissible factor in the dispensation of government jobs, except those jobs for the performance of which party affiliation is an "appropriate requirement." *Ante*, at 1. It is hard to say precisely (or even generally) what that exception means, but if there is any category of jobs for which performance party affiliation is not an appropriate requirement, it is the job of being a judge, where partisanship is not only unneeded but positively undesirable. It is, however, rare that a federal administration of one party will appoint a judge from another party. And it has always been rare. *See Marbury* v. *Madison*, 1 Cranch 137 (1803). Thus, the new principle that the Court today announces will be enforced by a corps of judges (the Members of this Court included) who overwhelmingly owe their office to its violation. *Something must be wrong here, and I suggest it is the Court.*

Rutan v. *Republican Party of Illinois*, 110 S. Ct. 2729 (1990) (emphasis added). The import of *Rutan* to the instant case, and the plaintiff's case in particular, was suggested by Plaintiff's Counsel when he argued at the hearing, "[t]he event of enormous importance that has occurred here which makes a change essential is *Rutan*. Without *Rutan* and without Justice Scalia's comment about the judicial branch, we wouldn't be here." Transcript at 3.

The plaintiff asks this Court to interpret the language of this dissent as "recognizing instantly if there ever was a position in government where political affiliation is not essential, it is judgeships." Transcript at 4. And further, as paraphrased by plaintiff's counsel, that Scalia was saying "I don't like this rule; but if that is the rule, then it's going to apply to judges." Transcript at 6.

This Court does not share in the plaintiff's interpretation. It seems apparent to this Court that the language selected by Scalia was carefully chosen to show not only the irony of the

majority's decision, but in fact how riduculous he believed the Court's conclusion was.[10] Only this interpretation explains the closing comment that "[s]omething must be wrong here, and I suggest it is the Court." Furthermore, the comment of Scalia is not the holding of the case, rather it is dicta contained in the dissent. It demonstrates the fervor of his disagreement rather than any extension of the decision to judicial appointments. Therefore, a constitutional violation will have to come from an expanded interpretation of *Rutan* and other such cases.

As such, the plaintiff is calling upon this Court to broaden the holdings of *Rutan*, *Branti* v. *Finkel*, 445 U.S. 507 (1980)[11]; and *Elrod* v. *Burns*, 427 U.S. 347 (1976), to include the appointment of judges. In order to do so, the Court must first look at the facts and the holdings in these respective cases.

The product of *Elrod* and *Branti* was a holding that patronage dismissals of certain public employees violate the rights to freedom of political belief and association protected by the First Amendment. In *Elrod* the newly elected Democratic Sheriff either discharged or threatened to discharge employees if they were not affiliated with or sponsored by the Democratic Party. The Supreme Court, in a 5-4 decision, written by Justice Brennan, with a concurring opinion by Justices Stewart and Blackmun, found that these

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[10] In *Payne* v. *Tennessee*, 59 U.S.L.W. 4814 (1991), Former Justice Thurgood Marshall, in one of his final decisions wrote, "[b]ased on the majority's new criteria for overruling, these decisions . . . must be included on the "endangered precedents" list: *Rutan* v. *Republican Party of Illinois*, 497 U.S. ____ (1990) (First Amendment right not to be denied public employment on the basis of party affiliation). . . ."

[11] Ironically, the facts surrounding *Branti* concernied a Democrat who had recently been *appointed* as Public Defender by the county legislature. Since there was no challenge to the appointment, it is not clear whether it was a political patronage appointment, however, the Court held that the appointed official could not discharge assistant public defenders due to their Republican political affiliation.

patronage dismissals severely restrict political belief and association, which constitutes the core of those activities protected by the First Amendment, and government may not, without seriously inhibiting First Amendment rights, force a public employee to relinquish his right to political association as the price of holding a public job. *Elrod*, 427 U.S. at 355-60 (citing *Perry* v. *Sindermann*, 408 U.S. 593 (1972), and *Kevishian* v. *Board of Regents*, 385 U.S. 589 (1967)).

The Court, however, further concluded that patronage dismissals of governmental officials holding policymaking positions were justified "to ensure that policies which the electorate has sanctioned are effectively upheld." *Elrod* at 372. This gave birth to the "policymaking" distinction the courts have since been forced to struggle with. As a result of *Elrod* the courts have been called upon to determine the extent of the employee's responsibilities, whether the responsibilities are narrowly or broadly defined, and whether the employee "acts as an advisor or formulates plans for the implementation of broad goals." *Id.* at 368. This has proved to be a difficult task.

In *Branti*, the Court reformulated the "policymaking" equation of *Elrod* to instead provide that the partonage activity was permissible if the "hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. This approach has since been recognized and utilized in the Sixth Circuit and other circuits. *Fraughender* v. *City of North Olmstead, Ohio*, 927 F.2d 909 (6th Cir. 1991); *see also Stott* v. *Haworth*, 916 F.2d 134 (4th Cir. 1990) and *Jones* v. *Dodson*, 727 F.2d 1329 (4th Cir. 1984).

In the final case of the trilogy, *Rutan*, the Court upheld the rationale of *Elrod* and *Branti*, and broadened the mandates to include hiring, firing, transfers, promotions, and recalls from layoffs. The question before this Court is whether *Elrod* and its progeny may be expanded to include gubernatorial appointments. To that question this Court answers in the negative.

Numerous cases have been brought to the attention of this Court, yet not one of the cases reflects a challenge to the appointment of judges. Instead, these cases address executive branch hiring and firings of executive branch employees. *See, e.g., Williams* v. *City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney did not enjoy First Amendment protection against politically motivated dismissal as it was a position for which political affiliation was appropriate requirement for effective performance); *Livas* v. *Petka*, 711 F.2d 798 (7th Cir. 1983) (assistant state prosecutor termination upheld); *Newcomb* v. *Brannan*, 558 F.2d 825 (7th Cir.) (deputy city attorney termination upheld), *cert. denied*, 434 U.S. 968 (1977); *O'Connell* v. *Gorski*, 715 F. Supp. 1201 (W.D.N.Y. 1989) (rational connection existed between shared ideology and job performance of assistant county attorney); *Finkelstein* v. *Barthelemy*, 678 F. Supp. 1255 E.D.La 1988) (city attorney could be fired for not supporting mayor's unseccessful property bill); *Mummau* v. *Ranck*, 531 F. Supp. 402 (E.D.Pa) (assistant attorney who only prosecuted juvenile cases termination upheld), *aff'd per curiam*, 687 F.2d 9 (3rd Cir. 1982); *Bavoso* v. *Harding*, 507 F. Supp. 313 (S.D.N.Y. 1980) (city corporate counsel county solicitor termination upheld).

To the contrary, the situation before this Court involves the gubernatorial appointment of an interim judge to vacancies created mid-term. The position the judge occupies is not one in the executive branch of the government, rather it is in the judicial branch. Unlike a "policymaking" employee, or an employee where political affiliation is "an appropriate requirement for the effective performance of the public office involved", the judge, once appointed, no longer serves at the pleasure of the governor and no longer can be looked upon to further the policies of the administration. This, however, does not mean that the candidate cannot be tapped to be an appointee for his or her views and beliefs. The plaintiffs argue that "it cannot follow that the Governor may properly appoint judges with the *purpose* and *expectation* that the judge will decide a case in a manner consonant with the Governor's

political views." Memorandum With Respect to Certain Matters Raised by the Court During the Hearing at 2 (emphasis added). This Court disagrees.

Specifically, the Court notes the Seventh Circuit decision of *Kurowski* v. *Krajewski*, 848 F.2d 767 (1988), wherein the Court provided in dicta as follows:

> A judge both makes and implements governmental policy. A judge may be suspicious of the police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions. In most states judges are elected, implying that the office has a political component. Holders of the appointing authority may seek to ensure that judges agree with them on important jurisprudential questions. The Governor of Indiana was entitled to consider Krajewski's views about the role of judges — *or even simply Krajewski's political affiliation* — when making the appointment [to the Supreme Court for the State of Indiana], just as the voters may consider these factors without violating the [F]irst [A]mendment when deciding whether to retain Judge Krajewski in office. (We put aside all debates about whether recourse to politics in selection judges is good or bad; we are concerned only with the constraints the [F]irst [A]mendment imposes on the way the State of Indiana prefers to organize its government.)

Id. at 770 (emphasis added).[12] The Court was clearly of the that political affiliation was an appropriate basis upon which a judge may be appointed.

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[12] The Court ultimately upheld a Magistrate Judge's determination that the termination of public defenders for their political affiliation was a violation of their First Amendment rights because, although an individual in the public defender position may have the potential of being named as a judge *pro tempore*, the public defender duties do not include judicial service. Any lawyer could be named as a judge *pro tempore*. Therefore, the position of public defender was not one which be filled based upon political affiliation.

Certainly the people of the State of Ohio that elected Governor Voinovich did so under the belief that he will make appointments in his ideological likeness. While it is true that the Governor should not "expect" an appointed judge to rule a certain way on any specific case, he may "hope" that a judge will make rulings consistent with a general ideology. To this end, a governor, for example, that has run a successful campaign on a "tough on crime" platform would be expected to select judges that harbor a similar general doctrine and would carry forth those beliefs in his or her imposition of the laws of the state. Furthermore, it is irrefutable that the difference between political parties are their views on a large variety of issues important to their respective parties. While some individuals in each party may share similar views on a few, or even several areas, the consistent trend is that the members of one party or another have joined their respective party due to their common interests, goals and views. So it is not unusual, and certainly not unconstitutional, for the governor, regardless of the governor's political party affiliation to look to his or her party for individuals with similar beliefs.

This is not to suggest, however, that there is not an element of political patronage to the selection of judges, both at the state and federal level. This certainly was recognized by Justice Scalia. However, to suggest that among the ranks of state and federal judges there is a corps of incompetence due to this political patronage factor, grossly overstates the minimalistic effect of granting some consideration to an individual's political affiliation prior to appointment. To the contrary, I would suggest that there is no shortage of lawyers,[13] nor lawyers qualified to be judges, nor qualified lawyers of a variety of political affiliations; Republicans, Democrats, and Independents alike.

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[13] Dan Quayle, Agenda for Civil Justice Reform in America, Address before the American Bar Association (August 13, 1991). In the report the Vice President notes that the United States is home to 70% of the world's lawyers.

The other matter which distinguishes this case and the appointment process from *Elrod* and its progeny is the fact that within a matter of months the appointee is called upon to face the electorate to determine whether he or she is suitable to retain the position to which he or she has been appointed. The specific employment decision in *Elrod*, *Branti* and *Rutan* are never subject to approval by the people of the state. While I am certain the title of incumbent is a benefit, it should be noted that the incumbent is not identified on the ballot, and the title of incumbent is no guarantee of success at the ballot box. Therefore, if the Governor has not selected an appointee wisely, that fateful decision is subject to rejection by the people of the county. At that time, the individual thwarted by the appointment process may wage a campaign against the appointed judge.

As for the process itself, it is set forth in the Ohio Constitution. However, the process was not always as it is today. As previously discussed, a major change was effectuated in 1851. At that time the power of appointment was taken from the legislature and given to the people. The only vestige of the appointment process is the governor's appointments to vacancies. This process has served the State of Ohio well and has survived two challenges; the latest of which was as recent as 1987. Clearly change can come about as it did in 1851 through amending the Ohio Constitution, however, this has not been done. Instead, the plaintiff has asked this Court to accomplish with its powers and a broadening of some case law, that which could not be accomplished through the legislative process, and that is to amend the Ohio Constitution to revoke the Governor's power of appointment to vacate judicial seats. This Court declines the use of that power. The people of the State have effectively provided their elected Governor with their proxy vote for the selection of interim vacancy judgeships. Should the governor abuse the power, legislative recourse is available.

Notwithstanding, if the Court were to view this case through the prism cast by *Elrod*, *Branti* and *Rutan* the position of Common Pleas Judge can be considered one where

political affiliation is an appropriate requirement for the effective performance of the public office. This is true especially in light of the fact that the people who elect the governor of a state should reasonably expect, and should be permitted to reasonably expect, that the governor will implement his or her views and political platform through various means and methods including the selection of judges, if provided for by that state's constitution.

Therefore, the Court finds that the plaintiff does not have a substantial likelihood of succeeding on the merits of this case. The Court now turns its attention to the second and third factors to be weighed in considering the motion for a preliminary injunction; that being whether the issuance of an injunction will spare the movant from suffering "irreparable harm", and whether the issuance of a preliminary injunction would cause substantial harm to others.

B. IRREPARABLE HARM TO PLAINTIFF AND SUBSTANTIAL HARM TO OTHERS.

The Court does not view the plaintiff's alleged harm as irreparable given that the greatest "harm" he may experience is that he will not receive appointment to the bench being vacated by Judge Murdock. Other appointments are sure to come. As provided by the defendant, in little more than a year that the Governor has been in office he has made eight judicial appointments in Hamilton County alone.

In turn, the effect upon the defendant of issuing a preliminary injunction preventing the appointment of the candidate is to leave the candidate in an unknown position for an unknown period of time. The stipulated appointee is the current Hamilton County Prosecuting Attorney. He must, at some point, declare his intentions concerning reelection to his current position if he does not receive the appointment he seeks. With the State laws regarding filing deadlines, coupled with the need for those individuals who may wish to run for election to the Hamilton County Prosecuting Attorney position, and all of the decisions that hinge upon the contingen-

cies inherent in declaring candidacy, a preliminary injunction would leave several individuals, Republicans and Democrats alike, in the very difficult position of unknown future employment as well as unknown elective opportunities. As such, the Court does not find that the plaintiff is faced with irreparable harm. Further, the Court is of the opinion that a preliminary injunction at this time would cause substantial harm to a wide variety of candidates and potential candidates for a variety of Hamilton County elected positions. The Court will next review the question of whether the public interest would be served by issuing a preliminary injunction.

C. PUBLIC INTEREST.

Certainly the public interest will be best served by the resolution of the instant matter so as to permit the efficient and effective administration of our chosen governmental processes. However, the test facing this Court is whether the public would be served by a preliminary injunction. Based upon the representations of counsel, the answer to this question apparently depends on whether "the public" is a Republican or a Democrat. Either way, in considering all four factors this Court finds that the plaintiff has failed to bear the necessary burden and thus a preliminary injunction should not be granted. As such, the motion for a temporary restraining order and a preliminary injunction is hereby DENIED.

Further, the Court *sua sponte* finds that the Plaintiff has failed to state a claim upon which relief can be granted under the remaining claims and therefore under Rule 12(b)(6) of the Federal Rules of Civil Procedure the remaining claims are hereby DISMISSED. This is a final appealable order.

IT IS SO ORDERED.

/s/ GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

U.S. CONST., AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

U.S. CONST., AMENDMENT XIV, SECTION 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

OHIO CONST., ART. IV, § 13

§ 13 Vacancy in office of judge, how filled.

In case the office of any judge shall become vacant, before the expiration of the regular term for which he was elected, the vacancy shall be filled by appointment by the governor, until a successor is elected and has qualified; and such successor shall be elected for the unexpired term, at the first general election for the office which is vacant that occurs more than forty days after the vacancy shall have occurred; provided, however, that when the unexpired term ends within one year immediately following the date of such general election, an election to fill such unexpired term shall not be held and the appointment shall be for such unexpired term. (As amended November 3, 1942.)

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.